STATE OF MAINE
PUBLIC UTILITIES COMMISSION

October 27, 1997

ORDER

PETER TALMAGE
Petition Requesting Commission
Intervention Regarding Efforts to
Obtain Net Billing Purchasing
Contract with Central Maine Power Company

Docket No. 97-513

NAOTO INOUE
Petition Regarding Commission Intercession
Regarding Efforts to Obtain Net Billing
Purchasing Contract with Central Maine
Power Company

Docket No. 97-532

WELCH, Chairman; NUGENT and HUNT, Commissioners

I. SUMMARY

In this Order, we find that Chapter 36's net energy billing provision is not preempted by federal law, because the rule does not require utilities to purchase power at rates higher than avoided costs. The rule provides for a billing and metering procedure that is within the state's authority over the retail practices of utilities.

II. BACKGROUND

On August 1, 1997, Peter Talmage filed a petition requesting that the Commission intercede in his efforts to obtain a net energy billing contract with Central Maine Power Company (CMP) for electricity produced by his 2.16 kilowatt solar electric system. Mr. Talmage stated that CMP told him that it would not offer any new net energy billing contracts because of a FERC decision issued in January 1995. On August 15, 1997, the Commission issued a Notice of Proceeding that allowed for an opportunity for intervention and for CMP to provide a response to the Talmage petition. On August 11, 1997, Naoto Inoue filed a similar petition with the Commission requesting intercession in his effort to obtain a net billing contract with CMP for his 4.5 kilowatt solar electric system. As with Mr. Talmage, Mr. Inoue states CMP informed him that it was no longer offering net energy billing arrangements because of the January 1995 FERC decision. On August 19, 1997, the Commission issued a Notice of Proceeding regarding the Inoue petition and consolidated the Inoue and Talmage proceedings.

The Commission received petitions for intervention from the Public Advocate and Peter Graham. A procedural order issued September 9, 1997 granting the petitions and stating that Mr. Talmage and Mr. Inoue are parties to this proceeding. All parties were provided an opportunity to submit their positions in writing. The Commission received comments from CMP, Mr. Talmage and the Public Advocate.

III. POSITION OF THE PARTIES

A. CMP

CMP's position is that Chapter 36, section 4(C)(4), that provides for net energy billing arrangements, violates Public Utility Regulatory Policy Act (PURPA) because it requires utilities to pay rates in excess of their avoided costs. CMP relies on the FERC decision in *Connecticut Light and Power Company*, 70 FERC ¶ 61,012 (Jan. 1995) for its view that Chapter 36 is preempted by Federal law. In that decision, FERC concluded that states cannot require electric utilities to purchase energy from qualifying facilities (QF) at rates above their avoided costs.

CMP currently meters and bills net energy customers using two meters: one meter measuring "in energy" and the other meter measuring "out energy." At any time that the customer's facility is generating more electricity than the customer is using, the excess generation is measured on the "out" meter. Conversely, at any point in time that the customer is using more electricity than is being generated by the facility, the customer's retail usage is measured by the "in" meter. At the end of each monthly billing period, the "out" meter reading is netted against the "in" meter reading. To the extent the out meter reading is greater than the in meter reading, CMP pays for the difference at its avoided cost rate. If the "in" energy reading is greater than the "out" meter reading, the customer pays for the difference at the regular residential retail rate. CMP argues that this arrangement has the effect of paying the customer the residential rate for excess energy recorded on the out meter that is netted against in meter usage. Because the retail rate is significantly greater than the Company's avoided cost, CMP asserts the net billing arrangement violates PURPA.

Finally, CMP states that it has not refused to enter into any contract with the petitioners. Rather, CMP has offered them the option of either a STEO agreement or CMP's standard agreement for facilities of 1,000 kilowatts or less; CMP's only objection is to enter a net energy billing arrangement.

B. Talmage

Mr. Talmage argues that the requirement that utilities enter into net energy billing arrangements is a function of State law, completely independent of PURPA; the authority to require net energy billing falls clearly within the State's jurisdiction over the terms and conditions of retail service and the determination of retail rates. PURPA does not expressly preempt the State's requirement and is silent on the question of net energy billing, leaving the question entirely to the states. Even if PURPA is controlling law in this area, Mr. Talmage argues that net energy billing does not violate PURPA, because it does not require utilities to make purchases at rates in excess of their avoided costs. Instead, net billing customers use electricity produced by their generation facilities to offset electricity that they would otherwise purchase from the utility. If net billing customers generate more electricity than they consume over the billing period, then the excess electricity is purchased by the utility at avoided cost rates. Moreover, Mr. Talmage notes that the FERC decision cited by CMP does not address net energy billing arrangements or suggest that they are preempted under PURPA. Maine's decision to use a periodic rather than an instantaneous measure of the net billing customers' purchase of electricity is within the scope of its authority over the terms and conditions of retail service.

C. Public Advocate

The Public Advocate's position is that CMP should be ordered to enter into net energy billing arrangements with the petitioners that will pay them appropriate avoided costs, in accordance with Chapter 36, for any amount of electricity generated by their solar arrays that exceeds, on a monthly basis, the amount used. The Public Advocate argues that such a result is required by applicable state law and Chapter 36, that it is does not violate PURPA, and that it is in accordance with long-standing public policy on the state and federal levels. Specifically, the Public Advocate's cites state policy in favor of the development of renewable resources, 35-A M.R.S.A. § 3302, and points out that what the petitioners are requesting is precisely what Chapter 36 requires. Further, the Public Advocate states that under Chapter 36 the only power obtained by the utility is purchased at avoided cost rates.

The Public Advocate agrees with Mr. Talmages' argument that PURPA does not control the situation; PURPA does not prescribe federal net metering and does not preempt state net metering requirements. The only effect that PURPA could have would be a requirement that net generation be sold back at avoided costs, which is required by state regulation. Thus, even

assuming that PURPA controlled, there is no violation. Moreover, the Public Advocate states that federal law and regulations are silent on the question of whether net generation of power is a retail or wholesale transaction every time that it occurs, or when the meter shows, at the end of the month, that there was indeed a net surplus. The question is for the states to answer.

Finally, the Public Advocate suggests that this situation warrants an investigation, or at least a hearing because there appears to be a question about whether CMP is willing to negotiate a contract with the petitioners. More importantly, the Commission would benefit from a full discussion of the issues raised in this case which will aid with the issues that must addressed in the rulemaking required by section 8 of the restructuring legislation.

III. DECISION

The sole issue before us in this proceeding is whether Chapter 36's net energy billing provision is preempted by federal law on the grounds that it, in effect, requires utilities to purchase power from QF's at rates above their avoided costs. The question of whether net billing in general or the specific approach contained in Chapter 36 constitutes a desirable policy is not before us; as we discuss below, such issues are properly raised in a rulemaking procedure regarding the provisions of Chapter 36.

Any claim of preemption must be viewed in light of the general proposition that state law and regulations are presumed valid and preemption is not easily found. Central Maine Power Company v. Town of Lebanon, 571 A.2d 1189, 1191 (Me. 1990). Preemption occurs when Congress has occupied an entire field of regulation, or state law conflicts with federal law or regulations in such a way that it becomes impossible to comply with both simultaneously. Maine Yankee Power Comp. v. Maine Public Utilities Commission, 581 A.2d 799, 802-803 (Me. 1990). Federal law has not occupied the entire field of electric utility regulation and has left the regulation of retail service to the states. Moreover, neither PURPA nor FERC's regulations have provisions regarding net energy billing. Therefore, we must review Chapter 36's net energy billing provision to determine whether compliance with the rule can occur without violating some aspect of federal law.

The provision at issue in this proceeding reads:

Net Energy Billing.

> a. Any qualifying facility that has an installed capacity of 100 kW or less may at its option sell electricity to an electric utility on a net energy billing basis.
>
> b. Net energy sales during any billing period shall be at rates established pursuant to paragraph 3 of this subsection.
>
> c. Nothing in this paragraph shall prohibit a utility from installing additional meters to record purchases and sales separately, provided, however, that no qualifying facility which elects to sell electricity on a net energy billing basis shall be charged for the cost of the additional meters or other necessary equipment.

Ch. 36, § 4(C)(4)

The rule also contains the following definitions:

> "Net energy" means for any time period the total electrical energy used by a qualifying facility plus the total electrical energy used by any related retail consumer of electricity located at the same site minus the total electrical generation of the qualifying facility.
>
> "Net energy billing" means a billing and metering practice that uses a single meter, capable of registering the flow of electricity in two directions, to record net energy transactions between an electric utility and a qualifying facility.

Ch. 36, § 1(18)(19).

There is no dispute in this proceeding that Chapter 36's net energy billing provision operates to require utilities to bill qualifying customers on a net basis over the billing period with net usage billed at the regular retail rate and net generation purchased by the utility at its avoided cost. It also appears to be undisputed that the purpose of the Chapter 36 provision was not to promote the development of small renewable facilities by requiring utilities to purchase power at rates above avoided costs; both state statute and Commission regulation explicitly

state that rates paid to QF's shall not be greater than avoided costs. 35-A M.R.S.A. § 3307; Ch. 36 § 4(C)(1); see also Foss Mill Hydro-Electric Station/North New Portland Energy, Docket Nos. 90-129, 90-151 at 7-8 (Me. P.U.C. Mar. 6, 1991). The questions, therefore, becomes whether the Commission, by adopting the net energy billing provision, inadvertently required utilities to purchase power at rates above avoided costs.

The question of whether state net energy billing provisions constitute paying above avoided costs and are thus preempted, appears to be one of first impression.[1] CMP relies primarily on FERC's 1995 Connecticut Light and Power Company decision, 70 FERC ¶ 61, 012 (Jan. 1995). In that case, FERC concluded that state laws that require utilities to purchase power from QF's at rates higher than avoided costs are preempted, because PURPA and FERC regulations explicitly state that rates for QF purchases may not exceed avoided costs. FERC made this decision in the context of a Connecticut statute that required a utility to purchase power from a municipal resource recovery facility at its retail rate. This decision is not on point. Chapter 36 does not require utilities to purchase power at retail rates or otherwise contain a policy of requiring payment of more than avoided costs as did the Connecticut statute. The FERC decision may have been of great consequence to states with energy policies encouraging the development of particular resources through prices greater than avoided costs; it was not of particular importance in Maine because, as discussed above, both state and Commission policy have always required that utilities pay no more than avoided costs for power.[2] It is important to note, however, that the FERC decision was one of law; it explicitly stated that the question of whether a particular rate does or does not exceed avoided costs is a matter of fact that is left to the appropriate state or judicial forum.

The situation in this case is not one where the state has sought to promote its energy policies by requiring utility payments above avoided costs. The question is whether Chapter 36's net energy billing provision requires utilities to purchase power above avoided costs even though this was not the intent or purpose of the rule. A review of the order adopting Chapter 36 indicates that the net energy billing provision was explicitly designed as a retail billing and metering practice adopted for

[1] CMP has not cited any decision that finds net energy billing arrangements to be preempted.

[2] Because federal and state law are the same on this point, we do not need to address Mr. Talmage's argument that PURPA and federal regulations do not apply on the grounds that his facility is not a FERC certified QF.

the purpose of avoiding the cost of a second meter for very small facilities. Chapter 36 Cogeneration and Small Power Production, Docket No. 80-268 at 5 (May 7, 1981). The use of a single meter that runs backwards was authorized based on the premise that requiring two meters (one for purchases and one for sales) would be unnecessarily costly for such small facilities. *Id. at 3*. In the order, the Commission explained:

> Typically, these situations involve residential customers who install a windmill or other small scale generator. On an annual basis, these installations will not provide all of the electricity needs of a house, but there may be certain hours and perhaps even certain months during which the facility will produce more electricity than the customers uses. The question is how to set rates and meter these types of facilities without unduly burdening the qualifying facility.
>
> Generally, the interconnection of a qualifying facility will require the installation of a second meter to record the output of the generating equipment and will result in an additional monthly charge. To remove the disincentive of the additional monthly charge, small facilities have been allowed to engage in net energy transactions which would use the customer's existing meter only. Periods during which the windmill or other generation facility does not produce sufficient electricity to satisfy the needs of the customer, the meter will record the customer's net energy purchase of electricity. When the windmill is producing more energy than is being demanded by the customer, the meter will run backwards, thus recording a net energy sale of electricity to the utility. At the end of the month (or other billing period) the meter would have recorded the net energy interchange during the billing period and the customer will pay for his net purchases at the normal retail rate. If, however, the meter shows that during the month the customer has been a net seller of electricity, the price for the net energy sales to the utility will be determined by agreement of the parties or it will be established by the Commission at the standard rates which will be published pursuant to chapter 36.

Id. at 18.

Thus, the Commission adopted the net energy billing provision as a billing and metering mechanism to avoid unnecessary costs. No party argued during the rulemaking that such an arrangement constituted a requirement for utilities to

pay more than avoided costs. It was simply a practical means of addressing the situation of residential customers installing small generation facilities. A rule that seeks to avoid costs for such customers by allowing for net billing through use of a single meter is within the State's authority to address issues of retail metering and billing. At no point under a net billing arrangement does a utility actually pay for any power at above avoided costs. For these reasons, Chapter 36's net energy billing provisions are not preempted.

At some point in time, CMP decided to install two meters for its net energy customers.[3] Such a practice is allowed under Chapter 36 as long as the customers are not charged for the costs of the second meter. However, the rule contemplated that the use of a second meter would be limited and installed primarily for research purposes.
Id. at 19. The rule did not envision a general practice of using two meters, because its premise was that installation of two meters was not cost effective.When CMP concluded that the use of two meters had become necessary or desirable, it should have informed the Commission that the underlying premise of the rule had changed and proposed that the net energy billing provision be modified. It may be the case that the use of two meters is now desirable and, if so, it may be more accurate or otherwise appropriate to bill customers as CMP proposes in this proceeding. Even if we were to assume this to be the case, such a change in the desirability of billing and metering customers using a single meter does not transform a valid rule into one that is preempted.

To the extent CMP believes the use of two meters with customers paying for the "in" meter usage, and the Company paying for "out" meter generation (so that there is no net bill) represents sound public policy, it should make that argument in a rulemaking proceeding. The Commission will be reviewing all provisions of Chapter 36 in light of electric utility restructuring and will be considering issues related to net energy billing in the context of retail access.[4] We will review

[3] CMP states that it uses two meters: 1) to ensure that the entire amount of energy used is identifiable for state sales tax purposes; 2) meters are not designed to run backwards; and 3) its billing computer program cannot deal with lower readings in a subsequent month.

[4] Because we will be considering the propriety of net energy billing in a restructured industry, there is a question as to whether CMP should be required, pending resolution of the issues, to enter any new net billing contracts that extend beyond March 1, 2000. For this reason, we would consider requests for a waiver of requirements to enter contracts beyond that date.

information provided in this proceeding when considering the issue. CMP is free to make any policy argument it wishes at the time.

Because we find Chapter 36's net energy billing provision is not preempted, we direct CMP to comply with the existing rule. We deny the Public Advocate's request for a hearing because there is no factual dispute in this case and the broad issues of net energy billing will be considered in a future rulemaking.

Dated at Augusta, Maine this 27th day of October, 1997.

BY ORDER OF THE COMMISSION

_____

Dennis L. Keschl
Administrative Director

COMMISSIONERS VOTING FOR: Welch
Nugent
Hunt

NOTICE OF RIGHTS TO REVIEW OR APPEAL

5 M.R.S.A. § 9061 requires the Public Utilities Commission to give each party to an adjudicatory proceeding written notice of the party's rights to review or appeal of its decision made at the conclusion of the adjudicatory proceeding. The methods of adjudicatory proceedings are as follows:

1. Reconsideration of the Commission's Order may be requested under Section 6(N) of the Commission's Rules of Practice and Procedure (65-407 C.M.R.11) within 20 days of the date of the Order by filing a petition with the Commission stating the grounds upon which consideration is sought.

2. Appeal of a final decision of the Commission may be taken to the Law Court by filing, within 30 days of the date of the Order, a Notice of Appeal with the Administrative Director of the Commission, pursuant to 35-A M.R.S.A. § 1320 (1)-(4) and the Maine Rules of Civil Procedure, Rule 73 et seq.

3. Additional court review of constitutional issues or issues involving the justness or reasonableness of rates may be had by the filing of an appeal with the Law Court, pursuant to 35-A M.R.S.A. § 1320 (5).

Note: The attachment of this Notice to a document does not indicate the Commission's view that the particular document may be subject to review or appeal. Similarly, the failure of the Commission to attach a copy of this Notice to a document does not indicate the Commission's view that the document is not subject to review or appeal.